Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BROWN DALTAS AND ASSOCIATES, INC., BENJAMIN I. BROWN, SPERO DALTAS, and BROWN DALTAS AND ASSOCIATES SAUDI ARABIA, LTD.,

Petitioners,

v.

NORTHBROOK EXCESS SURPLUS INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the application by the United States Court of Appeals for the First Circuit of a *de novo* standard of review grossly departed from the accepted and usual course of judicial proceedings.

LIST OF PARTIES

The parties to the proceeding below were the petitioners, Brown Daltas and Associates, Inc., Benjamin I. Brown, Spero Daltas, and Brown Daltas and Associates Saudi Arabia, Ltd. and the respondent Northbrook Excess and Surplus Insurance Company. General Accident Insurance Company of America was a defendant in the trial court. General Accident's name appears in the caption of the appeal, but it was not a party to the appeal.

Pursuant to Supreme Court Rule 29.1, the Petitioners state that none of them has parent companies or subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

THE PARTIES 4

BACKGROUND OF THE DISPUTE 5

THE TRIAL COURT OPINION 6

THE FIRST CIRCUIT OPINION 8

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 14

APPENDIX

TABLE OF AUTHORITIES

CASES

Page

Andersen v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985) 10

Inwood Laboratories v. Ives Laboratories, 456 U.S. 848, 857-58 (1982) 12

Layne and Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923) 9

United States v. Real Estate Boards, 339 U.S. 484 (1950) 12

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 10

STATUTES

28 U.S.C. § 1254(1) (1988) 3

28 U.S.C. § 1332(a) (1988) 2

OTHER AUTHORITIES

Fed. R. Civ. P. 52(a). 4, 9

Sup. Ct. R. 10.1(a) 9

BROWN DALTAS AND ASSOCIATES, INC., BENJAMIN I. BROWN, SPERO DALTAS, and BROWN DALTAS AND ASSOCIATES SAUDI ARABIA, LTD.,

Petitioners,

v.

NORTHBROOK EXCESS SURPLUS INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners Brown Daltas and Associates, Inc., Benjamin I. Brown, Spero Daltas, and Brown Daltas and Associates Saudi Arabia, Ltd. ("BDA" or "Petitioners"), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered on February 21, 1995, and the Orders denying Petitioners' Motion for Rehearing and Suggestion for Rehearing En Banc, entered on March 21, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 48 F.3d 30, and is reprinted in the appendix hereto, at App. A1 (hereinafter references to the appendix will be to "App. A__").

The opinion of the United States District Court for the District of Massachusetts (Brody, J.) has been reported at 844 F. Supp. 58, and is reprinted in the appendix at App. A30.

The orders of the Court of Appeals for the First Circuit denying Petitioners' Motion for Rehearing and Suggestion of Rehearing *En Banc* have not been reported, but are reprinted in the appendix at App. A61 and App. A65, respectively.

JURISDICTION

Petitioners invoked the diversity jurisdiction of the District Court pursuant to 28 U.S.C. § 1332(a) (1988). The District Court issued its Order and Memorandum of Opinion on February 15, 1994. It entered judgment for the Petitioners on Count I of their Complaint on March 1, 1994.[1] App. A54. The District Court then entered an Amended Judgment and an Order with respect thereto on

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[1] The District Court entered judgment for defendant General Accident Insurance Company of America on Count II of the Petitioners' Complaint. That judgment has not been appealed.

April 25, 1994. App. A56 and A59, respectively.

Respondent appealed from the judgment of the District Court and, on February 21, 1995, the Court of Appeals for the First Circuit filed an opinion reversing the judgment of the District Court. On March 21, 1995, the First Circuit denied Petitioners' Motion for Rehearing and Suggestion for Rehearing *En Banc*. App. A61 and A65, respectively.

This petition for a writ of certiorari has been filed within 90 days of March 21, 1995. This Court has jurisdiction to review the judgment of the First Circuit pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

There are no constitutional provisions, statutes, ordinances, or regulations involved in this case. This case does involve Federal Rule of Appellate Procedure 52(a) which states:

> (a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not

> necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

Fed. R. Civ. P. 52(a).

STATEMENT OF THE CASE

THE PARTIES

Petitioner Brown Daltas and Associates is an architectural firm incorporated under the laws of Massachusetts with its principal place of business in Fitchburg, Massachusetts. Benjamin Brown is a resident of Massachusetts and Spero Daltas is a resident of Rome, Italy. Brown Daltas and Associates Saudi Arabia Ltd. Is

a Saudi Arabia limited liability company. Respondent Northbrook Excess and Surplus Insurance Company ("Northbrook") is an insurance company incorporated under the laws of the State of Illinois with its principal place of business in Northbrook, Illinois. It was formerly named Northbrook Insurance Company. Jurisdiction is grounded upon diversity of citizenship pursuant to 28 U.S.C. § 1332(a) (1988). The matter in controversy exceeds the sum of $50,000, exclusive of interest and costs. There is complete diversity between the parties.

BACKGROUND OF THE DISPUTE

For the period May 5, 1981 to May 5, 1982 Northbrook provided claims made insurance coverage to BDA pursuant to an Architects and Engineers Professional Liability Policy. To invoke coverage BDA was required to notify Northbrook's claims and underwriting manager, Shand Morahan & Company, Inc. ("Shand") if it should "first become aware of any circumstance which may subsequently give rise to a claim" during the policy period. The notice provision of the policy required BDA to notify Shand upon notice of "any claim or incident or circumstance likely to give rise to a claim...."

In 1974, BDA contracted with the Saudi Arabian Monetary Authority ("SAMA") to design five branch banks in five cities in Saudi Arabia. The design of the banks was substantially uniform as was the heating ventilating and air conditioning ("HVAC") system. In 1978 Laing, Wimpey, Alireza ("LWA") was awarded the construction contract for the Riyadh branch. When it looked at the design documents, it had questions and

concerns which were addressed and satisfied by BDA. In the spring of 1981 when construction at the Riyadh branch was substantially complete, LWA charged that it would seek extra compensation for additional HVAC work. At a series of meetings, it alleged that the fault was with BDA's design rather than its own construction methods. LWA made a specific demand for compensation.

On November 25, 1981, BDA advised Shand of the possibility of a claim, and Shand opened a claims file. Thereafter, over the ensuing years, efforts were made to solve the HVAC failures which successively plagued each of the banks and made them uninhabitable. BDA consistently maintained that the HVAC failures were not due to design error.

In 1987 SAMA stated its intention to make claims against BDA for the poor design of the HVAC system of the banks, which, ultimately were completely replaced. SAMA's claims were resolved by a "zero sum settlement" in which BDA waived unpaid fees and expenses and SAMA released all claims against BDA. Northbrook authorized the settlement without admitting coverage.

BDA demanded Northbrook pay a portion of the fees and expenses waived in the zero sum settlement. Northbrook refused. BDA commenced this litigation, seeking judgment requiring Northbrook to indemnify it for a portion of fees and expenses waived.

THE TRIAL COURT OPINION

District Judge Morton A. Brody of the United

States District Court for the District of Maine, sitting by designation in the District of Massachusetts, tried this matter without a jury in December 1993. In his Order and Memorandum of Opinion of February 15, 1994, Judge Brody found the defenses to coverage asserted by Northbrook to be inadequate and held that BDA was entitled to coverage under the Northbrook policy. An amended judgment was entered in the amount of $1,062,066.78.

The trial court did not discuss whether BDA "first bec[a]me aware of any circumstances" which would lead to the assertion of a claim against it in the operative portion of the opinion. Rather, in setting forth the factual background of the dispute, the court included a footnote discussing the concerns expressed by LWA in 1979. Footnote 3 stated:

> Defendants maintain that LWA noticed this problem to BDASA in 1979. They cite a July 19, 1981 letter from LWA to BDASA that states:
>
> > This company has no design obligations. The error within your specification was pointed out in 1979 and at no time were revised on/off coil conditions placed with us. We would confirm your designer's own words at the recent meetings where he stated that a "mistake was made."

> This letter reference alone is insufficient to prove that BDA or BDASA had notice in 1979.

App. A37, n.3.

THE FIRST CIRCUIT OPINION

Northbrook appealed, arguing that the trial court made numerous errors in its factual findings. Northbrook did not argue that the trial court erroneously shifted the burden of proof with respect to the question of the timeliness of the notice to it. See App. A22, n. 3.

In its opinion of February 21, 1995, the First Circuit reversed the decision of the trial court. It held that the trial court erroneously shifted the burden of proof on the issue of when BDA first had notice of the potential claim against it to Northbrook. App. A21-22. Instead of remanding the case to the trial court for proceedings consistent with its opinion, the First Circuit undertook to review the record below itself. It concluded that BDA did not meet its burden of proof with respect to the issue of notice. App. A24. This petition seeks relief from the decision of the First Circuit.

REASONS FOR GRANTING THE WRIT

In electing to conduct a *de novo* review of the factual findings of the District Court the First Circuit applied an inappropriate standard of review, thereby grossly departing from the accepted and usual course of judicial proceedings. Thus, *certiorari* is warranted under the Court's power to supervise the conduct of the judiciary. Sup. Ct. R. 10.1(a).[2] The proper standard for appellate review of a District Court's findings of fact is set forth in Federal Rule of Civil Procedure 52(a): "Findings of fact

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[2] *Certiorari* is also appropriate in cases involving principles the settlement of which are of importance to the public. Layne and Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923). Applied in the context of claims made policies of insurance, the disregard for the district court's fact finding role has substantial implications not only for insureds and insurers, but also for the judicial system. In its decision, the First Circuit creates a totally unworkable rule as to the circumstances under which notice must be given under a claims made policy. Rather than run the risk of losing coverage, insureds will be required to report complaints or criticisms of any nature no matter how trivial, how groundless, or how unlikely to lead to a claim. Bad faith denials of coverage are promoted, as insurers in an effort to deny coverage will seek to pinpoint any knowledge before the relevant policy period of any problem, no matter how insignificant.

whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ignoring this well established rule, the First Circuit manufactured a "legal error" in order to go behind the trial court's findings and conduct its own *de novo* review. By improperly taking on the role of *de novo* reviewer, the First Circuit has usurped the district court's fact finding role, in effect substituting its judgment for the well-reasoned findings of the district court acquired during four trial days assessing the evidence and the credibility of the witnesses.

Had the First Circuit not applied the *de novo* standard, but rather employed the appropriate clearly erroneous standard, the District Court's determination of when notice was given by BDA to Northbrook would not have been disturbed on appeal. The District Court's decision was well anchored in fact, and could not have been reversed under the clearly erroneous test. The First Circuit must consider the district court's findings to be presumptively correct; a finding is only clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." United States v. United States Gypsum Co., 333 U.S. 364 (1948). The result in this action simply does not rise to that level. When there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. Andersen v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985). Unquestionably, had the proper standard been applied, there would have been no grounds for reversal of the District Court's

decision.

As a basis for its decision to conduct a *de novo* review, the First Circuit attributed to the District Court "a mistaken impression of applicable legal principles," App. A20, by speculating that the District Court had improperly shifted the burden of proof regarding notice from BDA to Northbrook. This is unsupported by the record; there was no error by the District Court.

The First Circuit opinion relies on dicta from a footnote in the district court's memorandum opinion in which it commented that information in a letter regarding knowledge of certain undescribed problems in the air conditioning design was alone "insufficient to prove that BDA or BDASA had notice in 1979." App. A37, n.3. The First Circuit read this statement as an implicit shift of the burden of proof from the insured to the insurer, and held that the district court misapplied the law. Relying on this alleged misapplication of law, the First Circuit held that it was not bound by the traditional clearly erroneous standard, but instead was entitled to give the facts *de novo* review.

The District Court, however, did not misapply the law. As the First Circuit acknowledged, both parties conceded that the burden of proof rested with BDA. App. A22, n.3. Further, BDA introduced substantial proof that it did not have notice of any information which it believed would lead to a claim. The First Circuit acknowledged that the subjective standard, i.e., the belief of BDA, controlled. The District Court's factual determination was essentially a determination as to the insured's state of

mind, i.e. whether the insured was aware of circumstances which it believed might give rise to a claim in the future. The District Court's finding was that BDA was not so aware. Looking to the evidence, the finding is amply supported and should not have been disturbed.

> An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.

Inwood Laboratories v. Ives Laboratories, 456 U.S. 848, 857-58 (1982), (citing United States v. Real Estate Boards, 339 U.S. 484, 495 (1950)).[3]

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[3] The uncontroverted record evidence, which the trial court credited, is that post-construction: (i) problems arose in May, 1981 during the commissioning (acceptance testing) of the air conditioning plant, See LWA letter of 19 July 1981; 6 April 1982 letter to Friend, Croager, Minutes and (ii) at a 23 October 1981 London meeting, LWA stated its intention to present to SAMA a claim for extra costs.

The only evidence respecting criticism of BDA's design prior to 1981 is found in the LWA letter of 19 July 1981 and Benjamin Brown's testimonial statement that he was aware of such criticisms. Brown testified, and the

The only basis for the First Circuit decision that the District Court misapplied the law rests in its interpretation of a single sentence contained in a footnote

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LWA letter affirms, that during the pre-construction and construction periods (late 1970's into 1981), Brown and the Insureds did not credit the criticisms.

The undisputed record evidence is that the criticism by LWA was in LWA's own language refuted by the architect: "We have on file your telexed reply of 12 October 1978 which refutes our concern and effectively advises us to proceed without concern." That was also the view of Benjamin Brown, who testified as to LWA's design criticism:

> [LWA] had many questions about the design from the beginning which we had been able to satisfy until, I suppose it's the letter that was the -- that they sent to the SAMA where they said we believe ....that the corrections will cost

so many millions...and the cost implications made us begin to worry about it that it may be a serious problem.

But in 1981 the landscape had changed. A contractor, who had completed construction, stated in certain terms that it was submitting to the Owner a priced claim for additional and corrective modifications caused by, he claimed, design error of the insured.

in the fact portion of its Memorandum Opinion.[4]

The First Circuit's interpretation has no basis in the District Court's actual allocation of the burden of proof. Thus, because the District Court never improperly shifted the burden of proof, the First Circuit had no legitimate grounds for applying the *de novo* standard. Accordingly, this Court should grant *certiorari* to exercise its power of supervision and to correct the First Circuit's gross departure from the usual and accepted course of judicial proceedings.

CONCLUSION

For the reasons stated above, this Court should grant its Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit in this matter.

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[4] Indeed, the entire basis for the First Circuit's decision may have been a mere stylistic preference. Had the District Court stated that the proof was insufficient to outweigh the facts presented by BDA, the First Circuit's analysis would have no basis whatsoever.

Respectfully submitted,

PETITIONERS,
BROWN DALTAS AND ASSOCIATES, INC., BENJAMIN I. BROAN, SPERO DALTAS, and BROWN DALTAS AND ASSOCIATES SAUDI ARABIA, LTD.,

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APPENDIX

CONTENTS OF APPENDIX

	Page
Appeal from The United States Court of Appeals for the First Circuit	A1
Order and Memorandum of Opinion	A30
Judgment	A54
Order	A56
Amended Judgment	A59
Order from United States Court of Appeals for The First Circuit	A61
Order of the Court	A65

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1576

BROWN DALTAS & ASSOCIATES, INC., ET AL,

Plaintiffs, Appellees,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, ET AL.,

Defendant, Appellee,

NORTHBROOK EXCESS & SURPLUS INSURANCE CO.,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Morton A. Brody, * U.S. District Judge]

Before

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* Of the District of Maine, sitting by designation.

Selya, Circuit Judge,
Bownes, Senior Circuit Judge,
and Stahl, Circuit Judge.

Erik Lund, with whom Sibley P. Reppert, Jon C. Cowen, and Posternak, Blankstein & Lund were on brief for appellant.

William Shields, with whom Day, Berry & Howard was on brief for plaintiffs-appellees.

February 21, 1995

BOWNES, Senior Circuit Judge. This appeal arises out of an insurance coverage dispute between defendant-appellant Northbrook Excess & Surplus Insurance Company ("Northbrook"), and plaintiffs-appellees Brown Daltas & Associates, Inc. ("BDA"), Brown Daltas & Associates Saudi Arabia Ltd. ("BDASA"), Benjamin I. Brown, and Spero Daltas (collectively, "the insureds").[1] At issue is whether Northbrook must indemnify the insureds under the discovery clause of a $1,000,000 claims-made architects and engineers professional liability policy ("the Policy") covering the period May 5, 1981 through June 4, 1982.

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[1] Individual plaintiffs Brown and Daltas are architects and the founders of BDA. They also hold significant stakes in BDASA. Both were named insureds on the insurance policy at the heart of this litigation.

The Saudi Arabian Monetary Authority ("SAMA") made an underlying claim of architectural design negligence in April 1987; the insureds and the SAMA settled it in February 1990. After a jury-waived trail, the district court resolved the coverage dispute in favor of the insureds, entering judgment for them in the amount of $788,637.57.

Although Northbrook asserts that this ruling was infected by several deficient factual determinations, its flagship appellate argument is that the court clearly erred in finding that the insureds first became aware during the policy period of the circumstances subsequently giving rise to the SAMA's claim. Such awareness on the part of the insureds is one of the conditions precedent to coverage under the Policy's discovery clause -- the only means by which coverage under the Policy was possible. After carefully reviewing the record and considering the parties' arguments on this question, we agree with Northbrook. Accordingly, we reverse.

I.

The background of this litigation has been fully set forth in a published opinion by the district court. See Brown Daltas & Assocs. Inc. v. General Acc. Ins. Co. of Am., 844 F. Supp. 58 (D. Mass. 1994). The facts will be reiterated here only to the extent necessary to explain and resolve the dispositive issue -- i.e., whether the insureds first became aware during the policy period of the circumstances subsequently giving rise to the SAMA's claim of design negligence.

A. General Background

In 1974, BDA, which was then operating as a partnership, entered into a contract with the SAMA to design branch bank buildings in the Saudi cities of Riyadh, Jedda, Damman, Mecca, and Medinah. BDA completed the designs during the period 1974-1978. In 1978, BDA (which was by then incorporated) and Xenel, a Saudi company, formed BDASA as a joint venture. That same year, BDASA entered into a contract with the SAMA to administer and supervise the construction of the banks. In 1983, BDASA and the SAMA entered into a second supervision contract.

From 1979 through 1986, BDASA was insured for liability arising out of its supervision of the banks' construction under consulting engineer's indemnity policies issued by underwriters at Lloyd's of London. From 1978 through 1985, BDA and, at least in some cases, BDASA were insured for liability arising out of their design of the banks under professional liability policies issued consecutively by Lloyd's underwriters, Northbrook, the Evanston Insurance Company ("Evanston"), and the General Accident Insurance Company of America ("General Accident"). As we have stated, at issue here is a $1,000,000 Northbrook professional liability claims-made contract issued for the period May 5, 1981 through June 4, 1982. The underwriter of the Policy was Shand, Morahan & Company ("Shand").

Because of its "claims-made" nature, the Policy generally provided coverage only for claims first made against the insureds during the coverage period. An exception to this general rule was, however, set forth in the Policy's discovery clause. In relevant part, this clause

provided:

> If during the policy period the Insured shall first become aware of any circumstances which may subsequently give rise to a claim against the Insured by reasons [sic] of any act, error or omission for which coverage would be afforded hereunder and if the Insured shall during the policy period herein give written notice to [Northbrook] of such circumstances, any claim which may subsequently be made against the Insured arising out of such act, error or omission shall be deemed for the purpose of this Policy to have been made during the policy period stated in the declarations.

(Emphasis supplied.)

Because the underlying claim here was not made by the SAMA until April 1987 -- nearly five years after the expiration of the Policy -- coverage for the insureds depended upon operation of the discovery clause. And the discovery clause establishes as a condition precedent to its operation that the insureds first become aware during the policy period of the circumstances subsequently giving rise to any claim for which they might seek coverage.

Construction of the Riyadh and Damman branch banks began in late 1978 or early 1979. Construction at the other three sites began later. At some point between 1978 and 1981 (the evidence relating to exactly when will

be set forth below), Laing Wimpey Alireza Ltd. ("LWA"), the contractor at the Riyadh, Damman, and Jedda sites, told BDA and BDASA that the heating, ventilation, and air conditioning ("HVAC") system was defectively designed. On November 25, 1981, following meetings with LWA in October 1981, BDA wrote to Shand and advised it of the possibility of a claim "in connection with the mechanical services in the building in Riyadh now nearing completion." In the first part of 1982, Shand wrote BDA and requested additional information. By letter dated June 30, 1982, BDA responded that (1) the potential claim was at the Riyadh branch; (2) the potential claimant was LWA; (3) "the areas of conflict surround the mechanical services, more particularly the heating, ventilation and air conditioning (HVAC) system"; and (4) "[i]t is important to understand that the Riyadh and Damma[n] Branches are identical designs."

Meanwhile, on April 6, 1982, BDASA also gave written notice to its Lloyd's underwriters of the possibility of a claim involving the air conditioning system. The April 6, 1982 notice did not specify the Riyadh plant as the site of the potential claim; nor did it explain how the claim might be covered under BDASA's supervision policy. It did, however, state that LWA was the potential claimant. Moreover, it listed "October 1981" as "the date on which [BDASA] first became aware of circumstances which may give rise to a claim being made against [it]." This date corresponds to the following assertions, which were included in a statement attached to the circumstances/claim notification form:

1. [BDASA] was informed by

[LWA] in May 1981 that there were certain problems in commissioning the airconditioning [sic] plant.

2. BDASA convened a meeting in Riyadh in June 1981 together with [LWA] and the representative of York International the equipment supplier, with the design mechanical engineer and the Rome project manager also present.

3. The next meeting was on 21 October 1981, when [LWA] said that he [sic] was not responsible, but had only to install the specified equipment. We replied that it was their responsibility to install a workable system. At this point we became aware that there was a possibility of a claim being made.

Although the controversy involving the banks' HVAC systems never completely subsided, no claim was made against BDA or BDASA for the next several years. In the interim, several attempts were made to commission the air conditioning systems at several of the banks. For a variety of reasons, none enjoyed sustained success. During this same period, BDA and BDASA periodically

submitted to the SAMA requests for the payment of fees (monthly payments on design work) and claims (extra costs that arose during design) owed for their work. The SAMA was not very responsive to these requests.

Finally, in November 1986, BDA and BDASA completed their design and supervision work, and requested financial resolution meetings with the SAMA. Contemporaneously, BDA issued a comprehensive report documenting SR 13,192,337[2] in unpaid fees and claims. On April 7, 1987, the SAMA responded to this report with a letter stating its intention to make claims of its own against BDA and BDASA in the amounts of SR 9,000,000 for negligence in the design of the electrical systems; SR 4,139,249 for negligence in the design of the HVAC systems; and over SR 5,000,000 for other errors (including supervision errors). The letter also stated that the SAMA was willing "to renounce all claims against BDA in return for a zero settlement to your final account." Although it took several years to consummate, the parties eventually entered into a zero-sum settlement in February 1990. The settlement was reached without either party initiating an adversarial proceeding.

B. Proceedings Below

Subsequent to their zero-sum settlement with the SAMA, the insureds sought indemnification from several of their insurers. Because the insureds could not obtain

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[2] The applicable exchange rate between the Saudi Riyal and the dollar is SR 3.75 per $1.00.

the relevant insurance at the time the SAMA's claim actually was made, coverage depended upon operation of discovery clauses in various of the insurance contracts. The insureds were able to obtain a $600,000 recovery from Lloyd's for that portion of the settlement attributable to supervision claims; the design insurers, however, contested coverage. The insureds therefore initiated the instant action.

In their complaint, the insureds alleged that Northbrook's failure to provide indemnification (up to the Policy's limit) for that portion of the settlement attributable to negligence in the design of the HVAC systems constituted a breach of contract and a violation of Massachusetts' unfair trade practices statute. See Mass. Gen. L. ch. 93A, §§ 2 and 11 (1993). The same allegations were made with regard to General Accident's failure to provide indemnification for that portion of the settlement attributable to negligence in the design of the banks' electrical systems. After a four-day bench trial, the court ruled in favor of the insurers on the Ch. 93A claims, and also ruled that the insureds' breach of contract claim against General Accident failed because of inadequate notice. See Brown Daltas, 844 F. Supp. at 66-68. None of these rulings is challenged on appeal.

The court also ruled that Northbrook had breached the Policy in failing to indemnify the insureds under the Policy for their settlement of the SAMA's claim of negligence in the design of the HVAC systems. Id. at 67. In so doing, the court found BDA's November 25, 1981 letter to Shand sufficient to invoke coverage under the Policy's discovery clause. See id. Of critical importance,

the court rejected Northbrook's assertion that the insureds had notice prior to the policy period of the circumstances subsequently giving rise to the SAMA's HVAC claim. Id. at 62 n.3. The court's finding on this issue reads:

> Defendants maintain that LWA noticed [the HVAC] problem to BDASA in 1979. They cite a July 19, 1981 letter from LWA to BDASA that states:
>
> > This company has no design obligations. The error within your specification was pointed out in 1979 and at no time were revised on/off coil conditions placed with us. We would confirm your designers [sic] own words at the recent meetings where he stated that a "mistake was made."
>
> This letter reference alone is insufficient to prove that BDA or BDASA had notice in 1979.

Id.

C. Evidence Relating to the Insureds' "Notice of Circumstances"

Although the portion of the July 19, 1981 letter from LWA to BDASA quoted by the district court is certainly relevant to the notice question, it is not the only part of the letter that pertains to the issue. Moreover, there is significant other evidence -- including the April 6, 1982 notice of circumstances from BDASA to Lloyd's, see supra at 6-7 -- relating to notice in this record. Because this is the basis upon which we resolve the dispute, we believe it important to relate the evidence in some detail.

1. The July 19, 1981 Letter

In addition to the passage cited by the district court, the lengthy July 19, 1981 letter from LWA (the contractor) to BDASA contains several other passages which at least suggest that the conflict over alleged negligence in the design of the HVAC systems predated May 5, 1981 -- the effective date of the Policy. The letter is a point-by-point response to nine assertions made to LWA by BDASA in a July 6, 1981 letter that is not in evidence; understanding it therefore is not particularly easy.

In paragraph one, LWA details a series of undated "recent meetings" between LWA and BDASA. The paragraph then states: "This recent meeting [sic], we were advised, was to finally agree [sic] the solutions to your long outstanding problems." Similarly, paragraph six asserts:

> Please advise on what basis your [sixth point in the July 6, 1981 letter] to be correct. Condensing Unit No. 5 was

> clearly specified by yourselves. The machine on site was approved by yourselves and we confirm that the compressor is larger than standard for this package.
>
> The possibilities of the problems actually experienced on site were raised by us in late 1978. We have on file your telexed reply dated 12 October 1978 which refutes our concern and effectively advises us to proceed without concern.
>
> We categorically refute any allegation of responsibility in this matter.

Finally, after responding to the ninth and final point in the July 6, 1981 letter, LWA states:

> We fail to see how this company having brought to your attention these problems as early as 1978 and continually throughout the contract and having demonstrated the problems and offered workable solutions, can be of more help.
>
> Your apparent wish to ignore, reject and refute our assistance continually is the major factor with regard to the total situation and all consequent delays.
>
> We must insist that the financial consequences and liabilities are resolved

prior to the placement of any orders.

2. Testimonial Evidence

In addition to the July 19, 1981 letter, evidence pertaining to plaintiffs' notice of circumstances came in through the testimony of Benjamin I. Brown, a principal of BDA and plaintiffs' most significant witness. Mr. Brown touched on the notice issue three times during the course of his extensive testimony.

Mr. Brown first gave testimony relating to this issue on direct examination:

> Q (By [Plaintiffs' Counsel]): Mr. Brown, in the insurance policies we looked at there was notification to [Shand] of a potential claim or incident under the name of [LWA], can you tell us what that was all about[?]
>
> A During the first year-and-a-half, two years, the contractor for the Riyadh branch named [LWA] brought it to the attention of the client and ourselves that their view of the HVAC system indicated that it would not function satisfactorily.
>
> And they said that on account of this, they could foresee that there would be additional costs to make revisions and corrections in the equipment before they could guarantee that the equipment would function properly.

In Saudi Arabia the contractors are rather like in Europe are responsible [sic] for producing a workable project, consultants don't have quite as much leeway there as they do here. So they would hold the contractors [sic] feet to the fire before they would ours.

Q. Now, Mr. Brown, are you sure that they were '78 or '71 [sic]?

[DEFENDANTS' COUNSEL]: Objection.

THE WITNESS: I am not -- I am sure it was -- it wasn't.

THE COURT: Just a moment, please.

THE WITNESS: I don't think I said --

THE COURT: Just a moment. Mr. Brown, when you hear an objection if you just sort of pause and give me a chance to address it.

[DEFENDANTS' COUNSEL]: I think it's a key factual issue here, and he is trying to lead the witness in my opinion.

THE COURT: Well, what I am interested in is what is indeed the fact. I will overrule the objection.

THE WITNESS: I am not sure I said '78 when LWA discovered it, it was several months, maybe a year-and-a-half or two after construction started in '78 when we received the first very serious criticism of the HVAC system from a reputable contractor who [sic] we had to investigate very seriously.

The question of notice was extensively revisited during Mr. Brown's cross-examination:

Q. (By [Defendants' Counsel]): I would like to move to the HVAC claim.

The notification as to that claim I believe you testified was in 1981, to Northbrook, is that right?

A. As I recall, yes.

Q. Now, the problem that gave rise to the notification was low suction pressure; is that correct?

A. Your memory is better than mine.

THE COURT: Are we talking now about the claim with regard to Riyadh or the claim in general?

[DEFENDANTS' COUNSEL]: Yes [sic]. This is the notification that was given in 1981 regarding the HVAC in Riyadh. I

> am going to show you [the July 19, 1981 letter from LWA to BDASA] . . . . It appears to be a letter from [LWA] to [BDASA].
>
> A. I am sure the letter is authentic. I don't recall it specifically, but it looks --
>
> Q. [LWA] was the contractor from whom the notification of potential claim came, right?
>
> A. Yes, and Mr. Wilson was the project manager on the site at that time as the signer of the letter.

After taking Mr. Brown through several of the specific problems alluded to in the July 19, 1981 letter, defendants' counsel continued his cross-examination:

> Q. Now, isn't it correct to say that [LWA] criticized the design back as early as 1978?
>
> A. Certainly before this letter in '81.
>
> Q. First reference to the timing of their criticisms of the design is on the first page, as I see it, the last, the second paragraph, the paragraph indicating No. 2 on the first page where it states, "The company, this company has no design obligations. The error within your

specification" --

A. Sorry, I've lost you.

Q. If you look at the first page of the document, sir, down at the bottom.

A. Okay.

Q. The second numbered paragraph, it states, "This company has no design obligations. The error within your specification was pointed out in 1979, and at no time were revised on/off coil conditions placed with us."

Do you see that?

A. Yes, I do.

Q. And isn't it correct to say that [LWA] did notify the company about its objections about the design back in 1979?

A. That's correct.

Q. And the -- on Page 3 under numbered Paragraph 6, there is a paragraph that says, "The possibilities of the problems actually experienced on site were raised by us in late 1978. We have on file your telex reply dated 12 October 1978 which refutes our concern, and effectively advises us to proceed without

concern."

Do you see that?

A. Yes.

Q. And do you have knowledge regarding that telex?

A. I don't recall that incident.

Q. Do you have any reason to believe that there was no such telex --

A. No.

Q. -- Back in 1978 from your company?

A. I am sure if he said it in writing it occurred.

Q. So it's fair to say that the problems asserted by LWA, regarding the air conditioning were asserted back in '78 to '79 time period?

A. Yes.

The notice question arose again on redirect examination:

Q. (By [plaintiffs' counsel]): [Defendants' counsel] raised with you

Exhibit 105, Mr. Brown. This was a letter from [LWA], dated 19 July 1981. Do you recall talking with him about that?

A. Yes, I do.

Q. All right. In October, in October 1981, do you recall attending a meeting with [LWA] or anybody on your staff?

A. I am sure I did not. I couldn't swear to the exact dates of meetings, but [LWA] had, had many questions about the design from the beginning which we had been able to satisfy until, I suppose it's the letter that was the -- that they sent to the SAMA where they said we believe, we, [LWA], believed that it, that the corrections to the system will cost so many millions of rials [sic] for this that and the other, and the cost implications made us begin to worry about it that it may be a serious problem if they are --

Q. Did you notify your insurance carrier when that happened?

A. I'm sure that's the point at which we asked on our notification.

II.

In reviewing a factual finding of a trial court made in connection with a bench trial, we almost invariably apply the clear-error standard of review. See Fed. R. Civ. P. 52(a). Thus, we must give the finding effect unless we are "`left with the definite and firm conviction that a mistake has been committed.'" See Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)); accord Dedham Water Co. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 457 (1st Cir. 1992). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson, 470 U.S. at 573.

If, however, an appellant can demonstrate that the trial court based its finding upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard. Inwood Labs. v. Ives Labs., 456 U.S. 844, 855 n.15 (1982); accord Cumpiano v. Banco Santander Puerto Rico, 902 F. 2d 148, 153 (1st Cir. 1990) ("It is settled that one way around the rigors of the `clearly erroneous' rule is to show that the trial court mistook the applicable law." (Citations omitted.)). "[T]o the extent that findings of fact can be shown to have been predicated upon, or induced by, errors of law, they will be accorded diminished respect on appeal." Dedham Water, 972 F.2d at 457.

The parties have treated Massachusetts law as controlling in this dispute. Because there is at least a "reasonable relation" between this litigation and the forum whose law has been selected (plaintiffs BDA and Mr. Brown were citizens of Massachusetts at all relevant

times), we shall forego an independent choice-of-law inquiry and look to Massachusetts law for our rules of decision. See Bird v. Centennial Ins. Co., 11 F.3d 228, 231 n.5 (1st Cir. 1993). Thus, in deciding whether legal error infected the crucial finding, we will be guided by Massachusetts law.

III.

Here, we think it clear that the trial court's finding regarding when the insureds first had notice of circumstances subsequently giving rise to the SAMA's claim was predicated upon an error of law. Northbrook makes much of the fact that, in making its finding, the court seems to have relied upon only the paragraph of the July 19, 1981 letter discussing the defectively designed on/off coil conditions. See Brown Daltas, 844 F. Supp. at 62 n.3 (setting forth the paragraph at issue and finding that "[t]his letter reference alone is insufficient to prove that BDA or BDASA had notice in 1979") (emphasis added). While it is unfortunate that the court failed to mention the balance of the evidence on this issue, we think that another serious error lurks in the challenged finding: an erroneous shift to Northbrook of the burden of proof. And although the parties have largely skirted burden questions throughout this litigation, we think that proper resolution of the burden of proof question effectively disposes of this appeal.[3]

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[3] Although Northbrook has not specifically argued that an erroneous shift in the burden of proof was implicit in the court's notice of circumstances finding, it can in no

Although we cannot find a Massachusetts case which discusses the burden of proof in a discovery clause issue like the one here, a general principle of Massachusetts insurance law settles the question:

> "[A] plaintiff seeking to recover for breach of a duty or obligation created by a general clause of a contract, which also contains an exception descriptively limiting such duty or obligation, must allege and prove that his cause of action

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way be seen as having conceded that the burden was its own. In its appellate briefs and throughout the course of this case, Northbrook has treated the burden of proving coverage as being properly placed upon the insureds. The insureds never disputed this position. Moreover, at oral argument, counsel for the insureds acknowledged that the insureds bore the burden of proof on another issue -- the question whether the November 25, 1981 letter from BDA to Shand constituted adequate notice under the Policy's discovery clause -- analytically analogous to the instant question. Thus, we discern no procedural bar to our analyzing the correctness of the trial court's finding through the lens of the burden of proof. Contrast Dedham Water, 972 F.2d at 458-59 (party's acquiescence in the application of a rule of law in the trial court precludes it from subsequently challenging the rule); Templeman v. Chris Craft Corp., 770 F. 2d 245, 247-48 (1st Cir.) (party's failure to object below to magistrate judge's choice-of-law ruling barred appeals court challenge to the ruling), cert. denied, 474 U.S. 1021 (1985).

> is within the contract and outside the exception; but . . . where the exception is in another separate and distinct clause of the contract defining the duty or obligation, then the burden is upon the party relying upon the exception."

Ratner v. Canadian Universal Ins. Co., 269 N.E.2d 227, 230 (Mass. 1971) (quoting Murray v. Continental Ins. Co., 48 N.E.2d 145, 147 (Mass. 1943)). In this case, the coverage-limiting provision upon which Northbrook relies is not set forth as a distinct exclusion in the Policy; it is the first sentence of the coverage-providing clause (i.e., the discovery clause) upon which the insureds' claims are anchored. It therefore was incumbent upon the insureds to prove the non-applicability of the coverage-limiting provision found in the first sentence of the discovery clause. Put in concrete terms, it was the insureds' burden to prove that they first became aware during the policy period of the circumstances subsequently giving rise to the SAMA's claim that the HVAC systems were negligently designed.

As we have stated, the trial court found that the quoted portion of the July 19, 1981 letter was "insufficient to prove that BDA or BDASA had notice in 1979." See Brown Daltas, 844 F. Supp. at 63 n.3. Implicit in this statement was an erroneous view that Northbrook bore the burden of proving prior notice. Thus, the deference usually due a factual finding under Fed. R. Civ. P. 52(a) does not bind us in this instance. See Inwood Labs., 456 U.S. at 855 n.15.

Mindful of our limited role as an appellate court, we ordinarily would remand this matter to the district court for a determination of the notice question under the proper legal standard. On this record, however, such a remand would be an empty exercise; no rational factfinder could find that the insureds proved that they first had notice during the policy period of the circumstances subsequently giving rise to the SAMA's claim. Accordingly, we will resolve the issue ourselves. See Williams v. Poulos, 11 F.3d 271, 280-81 (1st Cir. 1993) (discussing situations where an appellate court may decline to remand for resolution of factual and mixed fact/law issues) (collecting cases).

As an initial matter, there is a dispute as to the standpoint we should assume in deciding the notice of circumstances question. Citing cases that apply Illinois law, Northbrook asserts that the question should be viewed from an objective perspective, and that we need decide whether, prior to the policy period, the insureds knew of circumstances that should have put them on notice of the possibility of a claim. The insureds, however, treat the issue as a subjective one, essentially arguing that the question simply is whether, prior to the policy period, they were "aware of circumstances which [they] believed might give rise to a claim in the future." We need not resolve the dispute in this case.

Even if we assume arguendo that the question of notice should be viewed from a subjective perspective, the insureds still must show that they first became aware during the policy period of the circumstances that did lead them to notify Northbrook of the possibility of a claim. In

other words, the relevant point in time under the terms of the Policy is not the point at which the insureds first came to believe that a claim was possible; it is the point at which they first became aware of the circumstances which in fact led them to file their notice of potential claim. The distinction is critical in this case, because plaintiffs have not established that they first became aware during the policy period of the circumstances which led to their November 25, 1981 letter to Northbrook.

Northbrook takes the position that LWA's criticism of the design of the HVAC systems constitutes the notice-triggering "circumstance" under the Policy. The insureds, however, have not made entirely clear their stance on this crucial question. On redirect examination, Mr. Brown testified that the notice-triggering circumstance was a letter that the contractor (LWA) sent to the SAMA which allegedly stated "we believe, we, [LWA], believed that it, that the corrections to the [HVAC] system will cost so many millions of rials [sic] for this that and the other." See supra at 16. This, of course, conflicts with the April 6, 1982 notice from BDASA to Lloyd's, which states that the notice-triggering circumstances occurred at an October 21, 1981 meeting in Riyadh. See supra at 6-7. It also conflicts with the insureds' brief, which contends that the notice-triggering circumstances were "the meetings in the summer of 1981 [between representatives of BDA, BDASA, LWA, and the HVAC equipment supplier], followed by the October meeting in London and LWA's claim to SAMA." Regardless, close scrutiny of the record reveals that none of the insureds' theories vindicates their baseline position.

Mr. Brown's assertion that a letter from LWA to the SAMA was the notice-triggering circumstance simply cannot support a finding that the insureds first became aware of the notice-triggering circumstances during the policy period. The letter to which Mr. Brown alludes is not part of the record, and we have no evidence that it was sent during the policy period. Even more fundamentally, we have no elaboration from the insureds as to how this letter altered the then-existing landscape in such a way that, after it was sent, the insureds first believed that a claim against them was possible. One might infer from Mr. Brown's testimony that this letter was the first time LWA attached a cost to the design errors, and that this was the notice-triggering circumstance; the insureds, however, have made absolutely no argument to this effect.

The insureds' contention that the meetings in the summer and fall of 1981 constitute notice-triggering circumstances is similarly flawed. The insureds do not say much about what occurred at those meetings, let alone explain how the communications at those meetings were so qualitatively different from prior communications between themselves and LWA that it led them, for the first time, to believe that a claim was possible. And the scant record evidence of what occurred at those meetings reveals nothing beyond LWA informing BDA and BDASA of its view that the HVAC system was, at least in some respects, incorrectly designed. Essentially unrebutted, then, is Northbrook's argument that LWA's assertion of this view was the notice-triggering

circumstance.[4] Therefore, the question really boils down to whether a reasonable factfinder could find that the insureds proved by a preponderance of the evidence that LWA's view was first expressed during the policy period. No such finding is possible on the records before us.

We need not reiterate all the evidence regarding when LWA first criticized (or seriously criticized, see supra note 4) the design of the HVAC systems. It is sufficient to state that there is significant record evidence indicating that such criticism predated the policy period. This evidence includes the July 19, 1981 letter's indications that problems with the design of the on/off coils had been pointed out in 1979, and that problems with the design of Condensing Unit No. 5 had been pointed in 1978. It also includes: (1) Mr. Brown's direct testimony that LWA had informed the insureds' of its view that the HVAC system "would not function satisfactorily" within a year-and-a-half or two years of construction beginning

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[4] In stating in their brief that "[g]eneralized criticisms of the design by a contractor, far from being unusual in any construction setting, are simply not events which require a designer to put his carrier on notice," the insureds may be implying that no sufficiently serious or specific design criticisms were lodged against them by LWA prior to the policy period. Without further explication
(including a statement as to where and when the criticisms became sufficiently serious and specific) and supporting record evidence, however, such an implication is inadequate.

(in late 1978 or early 1979); (2) Mr. Brown's direct testimony that LWA had seriously criticized the design of the HVAC systems within two years of construction beginning; and (3) Mr. Brown's concession on cross-examination that the problems asserted by LWA regarding the air conditioning had been asserted back in 1978-79. To the extent that the insureds wish us to construe this testimony as involving careless guesswork on the part of Mr. Brown, we note that no attempt at clarification was made on redirect examination.

On the other hand, there is a total absence of evidence tending to indicate that LWA's criticism of the HVAC system's design first occurred during the policy period. Because such criticism was apparently the "circumstance" that prompted the insureds to notify Northbrook of the possibility of a claim of design negligence, and because the insureds bore the burden of proving that they first became aware during the policy period of the circumstances subsequently giving rise to the SAMA's claim, this ends the matter. Judgment should have been entered in favor of Northbrook.

IV.

For the reasons stated above, the district court's finding in favor of the insureds on the question of notice is premised upon an incorrect view of the burden of proof and is not sustainable. Moreover, while we agree completely that generalized criticisms of shortcomings in a party's product or performance will ordinarily be insufficient, without more, to serve as a notice-triggering circumstance for purposes of claims-made coverage, this

is not the garden-variety case. Here, the insureds' lack of proof is a determining factor. In short, our reading of the record in the light of the proper burden of proof leads us to conclude that judgment should properly enter in favor of Northbrook. The district court's contrary judgment is therefore reversed.

Reversed. Costs to appellant.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BROWN DALTAS AND ASSOCIATE INC., BENJAMIN I. BROWN, SPERO DALTAS, AND BROWN DALTAS AND ASSOCIATES SAUDI ARABIA LTD., Plaintiffs,	)
v.	) Civ. No. 91-10010-K
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, AND NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY, Defendants.	)

ORDER AND MEMORANDUM OF OPINION

BRODY, District Judge

I. FACTS

Brown Daltas and Associates ("BDA"), an architectural firm, entered into a contract with the Saudi Arabian Monetary Authority ("SAMA") in April 1974.[1]

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[1] BDA operated as a partnership when it signed the design contract with the SAMA. In 1976, the parties of

Under this contract, BDA planned and designed branch banks for the SAMA in Jedda, Riyadh, Damman, Mecca, and Medina over a period of approximately four years.

In 1978, BDA entered into a joint venture with Xenel, a Saudi Arabian Company.[2] In the same year, the SAMA entered a supervision contract with Brown Daltas and Associates Saudi Arabia Ltd. ("BDASA"). Under the supervision contract, BDASA administered and supervised the construction contracts for the branch banks. BDASA and the SAMA signed another supervision contract in 1983.

A. Insurance Coverage

1. Supervision coverage

BDASA carried consecutive, annual, consulting engineer's indemnity policies issued by underwriters at Lloyd's, London from January 1979 through February 1986.

2. Design coverage

BDA carried professional liability

BDA formed a Massachusetts corporation called Brown Daltas and Associates, Inc. The Court refers to both the partnership and the corporation as "BDA".

[2] Xenel owned 25% of the joint venture. The remaining 75% was owned by Brown Daltas & Associates Ltd., a British company.

insurance issued by underwriters at Lloyd's London until April 1979. The 1978-79 Lloyd's policy named both BDA and BDASA as insureds. The policy listed the SAMA branch banks as the largest percentage of BDA's total work, but excluded the "Saudian [sic] Arabian Joint Venture". It therefore covered BDA's SAMA design work, and excluded the supervision work by the joint venture, BDASA.

In May 1979, BDA transferred its professional liability insurance to one of the Defendants, the Northbrook Excess and Surplus Insurance Company ("Northbrook").

The underwriting manager for Northbrook was Shand, Morahan & Company ("Shand"). The Northbrook policies required BDA to report claims to Shand.

Northbrook issued BDA claims-made professional liability policies. The policies defined claims-made insurance as follows:

> **Coverage: Claims Made Provision.** The Company will pay on behalf of the Insured all sums in excess of the deductible amount stated in the Declarations which the Insured shall become legally obligated to pay as damages by reason of any act, error or omission committed or alleged to have been committed by the Insured, or any person or organization for whom the Insured is legally liable provided always

that:

(a) Claim is first made against the Insured during the policy period by reason of such act, error or omission, and

(b) The Insured's legal liability arises out of the performance of professional services as described in the Declarations, and

(c) The Insured has no knowledge of such act, error or omission on the effective date of this Policy.

The policies contained a discovery clause:

Discovery Clause. If during the policy period the Insured shall first become aware of any circumstances which may subsequently give rise to a claim against the Insured by reasons of any act, error or omission for which coverage would be afforded hereunder and if the Insured shall during the policy period herein give written notice to the Company of such circumstances, any claim which may subsequently be made against the Insured arising out of such act, error or omission shall be deemed for the purpose of this Policy to have been made during the policy period stated in the declarations.

All Northbrook policies covered both BDA and BDASA. The first Northbrook policy provided that it was a renewal of BDA's Lloyd's policy. The policy stated that "[a]ll work as construction managers is currently separately insured with Lloyd's of London."

The second Northbrook policy was a renewal of the first, and it ran from May 1980 to 1981. The policy did not contain language indicating that construction supervision was separately insured elsewhere. However, question 20 of the application asked whether any one contract or client represented more than 50% of annual work. BDA's answer stated: "At present two projects insured separately represents [sic] 83% of BDA's work." One of these projects was BDASA's supervision work for the SAMA.

The third Northbrook policy, number 63133836, was a renewal of the second, and ran from May 1981 to June 1982. Question 16 in the application for this policy requested fees and construction values spanning from 1979 to 1982. BDA supplied the information, and noted "* SAMA" next to some of the numbers listed under "Gross billings/Fees." At the bottom of the chart a legend read "* Separately insured elsewhere." The noted fees were those that BDASA was billing SAMA. The policy also contained a construction management endorsement that excluded claims due to faulty supervision work.

Between June and August of 1982, BDA consented to a change in insurance carrier, and the Evanston Insurance Company provided coverage. Shand continued as underwriting manager.

Shand transferred BDA's professional liability policy to the General Accident Insurance Company of America ("General Accident") in August 1982. All of the General Accident policies insured BDA and BDASA, and included the same claims-made provision and discovery clause as the Northbrook policies. See supra at 2-3.

The first General Accident policy ran through September 1983. The policy contained a joint venture endorsement that provided coverage under the policy for BDA's involvement in joint ventures. Addition of the joint venture endorsement necessitated an exclusion of coverage for specific operation ("specific operation exclusion"). The exclusion states:

> there is not coverage hereunder for any work performed by the Named Insured for the following project or firm: KKMC, Joint Venture, SAMA, Joint Venture & MOH, Joint Venture.

The language before the colon was Shand boilerplate, and Richard Shapleigh, BDA's comptroller, drafted the language that excluded the three joint ventures. The Court reads the specific operation exclusion to exclude BDASA's supervision work for the SAMA. This conclusion is buttressed by BDA's answer to question 16 in the policy application. It listed fees and collection values from 1980 through 1983. An asterisk followed certain numbers on the list. A legend at the bottom of the page read: "SAMA Supr. insured elsewhere". This legend indicated that the SAMA supervision work performed by BDASA was not covered by this policy. The obvious inference is that the

other work that BDA did for the SAMA was covered by the policy.

The second General Accident policy, number PE11970, ran from 1983-84 and was in all relevant respects identical to the preceding policy.

The 1984-85 General Accident policy, number PE15181, contained a page with the specific operation exclusion, and a clarification of the exclusion that Comptroller Shapleigh drafted. In addition to the language quoted above, the exclusion states:

> For clarification purposes, the Joint Ventures named above are more specifically identified as . . . Brown Daltas and Associates Saudi Arabia LTD [BDASA] . . . prime contractor for the Saudi Arabian Monetary Agency [SAMA] - Branch Bank Building Program (Construction Supervision).

BDA's answer to question 16 in the application to PE15181 stated more clearly that BDASA, or the SAMA supervision work, was separately insured elsewhere. The legend read: "SAMA . . . Supervision-Insured Elsewhere."

Spurred to action by its apparent confusion about coverage for the SAMA project, Shand finally requested the Lloyd's policies covering BDSA's supervision work for the SAMA in August 1985. In October 1985, Shand filed a declaratory judgment action in this Court, seeking a declaration that their policies did not cover any of BDA's

work for the SAMA. This action was later dismissed without prejudice. Soon after filing the declaratory judgment action, General Accident terminated BDA's insurance policy.

B. The Project

BDA completed the design phase of the branch banks in 1978. Laing, Wimpey, Alireza ("LWA") bid on the contracts at Riyadh, Damman, and Jeddah. Construction of the branch banks in Riyadh and Damman began in late 1978.

1. HVAC system

LWA informed BDA of a potential problem with mechanical services in the Riyadh branch in late 1981.[3] In an October 1981 meeting, LWA charged that the heating, ventilation and air conditioning ("HVAC") system was defectively designed. BDA advised Shand of the

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[3] Defendants maintain that LWA noticed this problem to BDASA in 1979. They cite a July 19, 1981 letter from LWA to BDASA that states:

> This company has no design obligations. The error within your specification was pointed out in 1979 and at no time were revised on/off coil conditions placed with us. We would confirm your designer's own words at the recent meetings where he stated that a "mistake was made."

This letter reference alone is insufficient to prove that BDA or BDASA had notice in 1979.

possibility of a claim on November 25th, and Shand opened a claims file. Shand requested additional information about the claim that BDA provided in June 1982. BDA stated that the design of both the Riyadh and the Damman branch was identical, and that BDA was attempting to establish that the cause of the problem was something other than faulty design. Shand sent BDA a letter in December 1982 stating that BDA had provided no further information, and that the claims file was being placed on inactive status, but could be reopened if the incident resulted in a claim. In August 1982, John Rothkopf, a claims handler at Shand, stated that the liability of underwriters "appears to be that of the insured," meaning that if a claim were made, he saw no grounds to disclaim coverage.

The construction subcontractor redesigned and installed a HVAC system different than the one that BDA designed. This system failed. Eventually a specialist engineer, Chris Burgess, advised LWA to rebuild the Damman and Riyadh air conditioning systems to conform them to the original BDA design. LWA made an effort to conform the system to the original BDA design by 1985.

In June 1985, BDA sent Shand a letter enclosing a telex from John Thornley, a BDA designer in Saudi Arabia. Thornley reported the replacement of the HVAC system "in almost the precise configuration of our initial design." Thornley warned, however, that the system had not been tested, and requested BDA to "keep the present status." Thornley's hesitation to report success with the HVAC system stemmed from the appearance of an electrical problem that had prevented complete testing of

the HVAC system.

On June 21, 1986, BDA informed Shand that the maintenance contractor at Damman blamed BDA for problems with air conditioning compressors. BDA included a telex from the SAMA stating that the HVAC installer had reported that the HVAC systems were of "incorrect design" and that "an inherent compressor failure mode [was] present." BDA referred to the letter of notification dated November 25, 1981.

2. Electrical System

In BDA's original design of the branch banks, all electrical transformers were located in the banks. The power companies in Riyadh, Damman, and Jedda later refused to supply electricity in the voltage that the design required. Therefore, after BDA completed the design, but before contractors bid on the contract, BDA was forced to modify the design and move the electrical transformers out of the building. BDA connected the transformers to the building with low voltage cables. The added expense of these changes was reflected in a bulletin that BDA issued less than two weeks before the bid date. These added charges were called "unauthorized extras."[4]

BDA notified General Accident generally of the problem of "unauthorized extras" in a supplement to the

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[4] These charges were classified as "unauthorized" because they had not been approved by the SAMA through formal change orders.

application for PE15181. The supplement is dated September 19, 1984 and states:

> SAMA has indicated that if any unauthorized change orders resulting in increase in price can be attributable to design (and not supervision), these may be backcharged to BDA Inc. This item has already been filed with Carrier.

When LWA turned on the power to test the air conditioning system, some of the underground cables overheated. On June 26, 1985, the SAMA informed BDA that the electrical cables supplying the Riyadh branch were overloaded, needed to be replaced, and that BDA would be responsible for the cost of new cables. BDA notified Shand by letter of this possible claim the next day, but it was missent. BDA subsequently notified Shand by telephone and by letter dated July 18, 1985. BDA sent a letter to Shand on August 8, 1985 notifying them that the SAMA ordered electrical cable repairs.

In response to the electrical problem, BDA retained an electrical consultant, who generated a technical report. BDA sent this report to Shand and to the SAMA. In August 1985, the SAMA told BDA to instruct LWA to correct the cables, and told BDA that they would assess costs later. BDA notified Shand of the corrections.

C. Settlement

In June 1984, BDA presented the SAMA with the final technical and financial reports of the Jeddah and

Damman branches. The reports show both fees (monthly payments on design work) and claims (extra costs that arose during design) that the SAMA owed BDA.

In November 1986, BDA and BDASA completed the design and supervision services, and requested financial resolution meetings with the SAMA. BDA issued a comprehensive and well documented report of unpaid fees and claims. BDA and BDASA requested SR. 4,147,640 in outstanding fees and SR. 9,044,697 in outstanding claims, for a total of SR. 13,192,337.[5] Comptroller Shapleigh revised these figures in 1988 after SAMA paid some fees, leaving a balance of SR. 3,969,640 in outstanding fees.

BDA's financial report prompted a letter from the SAMA dated April 7, 1987 (the "9215 letter"). This letter stated the SAMA's intention to make claims against BDA. The SAMA proposed a SR. 9,000,000 claim for negligence in the design of the electrical system; a SR. 4,139,249 claim for poor design of the HVAC system; and a SR. 1,742,229 claim for errors on the "bills of quantity;" for a total of SR. 14,881,478. The 9215 letter also served as a vehicle for making a settlement offer. The final page of the letter stated that the SAMA was prepared "to renounce all claims against BDA in return for a zero settlement of your final account." The Court is satisfied that the 9215 letter reflects an accurate and fair allocation between design and supervision claims.

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[5] The applicable exchange rate is SR. 3.75 per $1.

After BDA received the 9215 letter, it notified its lawyer, Joseph Hinkle, and Shand. Hinkle in turn spoke with David Hatem, the lawyer retained by Shand. BDA and the SAMA began settlement discussions. BDA requested that the insurers participate, but the Defendants declined. Richard Hougham, BDASA's quantities surveyor, analyzed the SAMA's claims in preparation for the negotiations with the hope of reaching a global settlement with the SAMA and the insurers. His report was completed by May 1987. Hinkle kept the insurers informed of the negotiations throughout the process.

A May 15, 1987 record of some of the settlement negotiations indicated that the SAMA recommended an "alternative insurance recovery and enquired how SAMA could help." The SAMA required that BDA be covered by insurance as a condition to granting the branch bank design contract. It therefore follows that the settlement negotiations included discussion of BDA's insurance coverage.

BDA responded in writing to the 9215 letter in March 1988, stating that they could not afford to participate in a zero-sum settlement. The response led to further negotiations, and a written record of the negotiations prepared by the SAMA dated June 12, 1988 (the "13202 letter"). The 13202 letter referred to additional claims that the SAMA planned to bring against BDA, and explained that the SAMA would not pay BDA anything because of the SAMA's outstanding claims against BDA. The letter also reflected BDA's negotiating position, that the deficiencies were not design faults.

The SAMA did not sue BDA, nor did the parties enter a formal U.S.-style grievance procedure or arbitration.

After receiving the 9215 and the 13202 letters, BDA repeatedly requested that the SAMA define what were referred to as additional claims. There is absolutely no evidence in the record to support Defendants' allegation that BDA and the SAMA colluded so that BDA could get extra money from its insurers.

On June 28, 1988, Shand's counsel, Hatem, wrote BDA's counsel, Hinkle. The Hatem-Hinkle letter states:

> I recommend that BDA fulfill its obligation to mitigate any damages by consummating a settlement with SAMA pursuant to which SAMA agrees to release and waive any of its claims against BDA. I understand that this type of settlement arrangement has been available to BDA since at least as early as July 1987 and presently remains available to BDA. As I previously advised, BDA has the authority and consent of Northbrook, Evanston, General Accident and Shand to consummate a settlement along those lines without prejudice to any coverage defenses that those companies may have. (Emphasis added.)

This letter unambiguously provides BDA authority and consent to settle its claims with the SAMA, subject only

to the insurers' coverage defenses. BDA relied on this authority and consent while negotiating the final settlement.

BDA and the SAMA entered a zero-sum settlement agreement on February 16, 1990. BDA filed this action against Defendants alleging breach of contract and unfair trade practices on January 3, 1991.

II. BREACH OF CONTRACT

Each Plaintiff is a named insured on claims-made professional liability policies that Defendants issued. The insurance contracts are valid and enforceable, and Plaintiffs paid all premiums. Plaintiffs allege that Northbrook and General Accident breached these contracts when they refused BDA payment, causing damage to BDA.

Plaintiffs have standing to sue Defendants under the terms of the contract. Condition V in the policies provides that BDA cannot sue the Insurers "to recover for any loss under this Policy ... until the amount of such loss shall have been fixed or rendered certain ... by agreement between the parties with the written consent of the Company." The Hatem-Hinkle letter provided the necessary written consent to satisfy condition V.[6]

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[6] Defendant argues that without written authority to settle that Plaintiffs could not seek recovery, and cites Augat, Inc. v. Liberty Mut. Ins. Co., 571 N.E.2d 357 (Mass. 1991). Augat is inapplicable. It holds that an

A. Duty to Defend

Section V(a) in the Insuring Agreements section of the policies states:

> The Company shall defend any suit against the Insured seeking damages to which this Policy applies ... and it is agreed that the Company may make such investigation and settlement of any claim or suit as they deem expedient. (Emphasis added.)

The SAMA never sued BDA, and under the terms of the policies, Defendants were only required to defend against a "suit."[7] Defendants did not have, and therefore could not breach, a duty to defend Plaintiffs.[8]

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insurer has no duty to indemnify when the insured enters a settlement agreement without prior consent and the policy in question has a voluntary payment exclusion.

[7] An insured may argue that certain government-agency action triggers a duty to defend because it is the functional equivalent of a suit. Hazen Paper Co. v. U.S. Fidelity and Guar. Co., 555 N.E.2d 576, 581 (Mass. 1990). The 9215 letter from the SAMA was not, however, the functional equivalent of a suit.

[8] If this were a straightforward duty to defend case, case law is clear. An insurer who improperly declines to defend a claim is not automatically liable for the amount of any settlement reached. Polaroid Corp. v. The

B. Duty to Indemnify

The Hatem-Hinkle letter does more than give Plaintiffs standing to sue under the contract. It requires Defendants to indemnify BDA subject only to "coverage defenses."

Generally an insurer's duty to defend is more broad than its duty to indemnify. Boston Symphony Orchestra v. Commercial Union Ins. Co., 545 N.E.2d 1156, 1158 (Mass. 1989). It is generally accepted that the duty to defend is antecedent to the duty to indemnify. Id., Ryan v. Royal Ins. Co., 916 F.2d 731, 743 (1st Cir. 1990) (applying New York law). However, the Court has found no authority to support the allegation that because a claim fails to trigger a duty to defend, that an insurer who expressly and unambiguously consents to a settlement is not liable for the settled claims. In effect, the Hatem-Hinkle letter triggered the duty to indemnify under the policies, and created a distinct indemnification contract.

C. Coverage Defenses

Travelers Indem. Co., 610 N.E.2d 912, 920 (Mass. 1993); Berke Moore Co. v. Lumbermans Mut. Casualty Co., 185 N.E.2d 637, 639 (Mass. 1962). An insurer who wrongfully declines to defend a claim has the burden of proving that the claims were not within its policy coverage. Polaroid, 610 N.E.2d at 922. If the insurer fails to meet this burden, it is liable for a reasonable settlement. Berke Moore, 185 N.E.2d at 641.

Defendants must indemnify BDA for the SAMA claims that are not subject to valid coverage defenses. "Coverage defense" is not defined in the policy. The Court construes the term broadly to include any defense that Defendants can raise to argue that the claim does not fall under the policy. Defendants raise four coverage defenses: the withdrawal of fees provision; inadequate notice of the electrical claim; inadequate notice of the HVAC claim; and the specific operations exclusion. The Court finds for the Plaintiffs on three of the defenses; and for the Defendants on inadequate notice of the electrical claim.

1. Withdrawal of Fees

The policies exclude from their definition of damages "the return or withdrawal of fees." Defendants argue that a zero-sum settlement is a withdrawal of fees because under such an arrangement an insured drops its request for payment of fees in exchange for the claimant dropping its claims. Defendants may not avoid paying BDA on this basis.

The withdrawal of fees exclusion exists to prevent an insured and a claimant from colluding and obtaining an unwarranted insurance recovery. No evidence of collusion exists in this case. Further, Defendants' argument rests in formality and not logic. Defendants argue that no money changed hands in the zero-sum settlement, and therefore a withdrawal of fees occurred. However, the zero-sum settlement functions as if each paid the other.

2. Inadequate notice of the electrical claim

Defendant General Accident argues that BDA's notice of the electrical claim on September 19, 1984 in question 30 of the application for policy number PE15181 was insufficient.[9] The Court agrees and denies Plaintiffs' recovery on the electrical claim.

This notice does not bring the electrical claim under the 1984-85 policy. The Advisory Endorsement to that policy states that no coverage exists under policy number PE15181 for any claim "referred to in answer to question 30 in the application." BDA must therefore establish that the notice in the application to PE15181 brings the claim under the 1983-84 policy, PE11970.

There is no evidence that PE11970 was extended past September 4, 1984.[10] Therefore the notice given on September 19, 1984 was too late to be deemed notice under PE11970.

Even if PE11970 were extended until PE15181

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[9] As stated supra at 9, question 30 states, in relevant part;

> SAMA has indicated that if any unauthorized change order resulting in increase in price can be attributable to design ... these may be backcharged to BDA Inc. This item has already been filed with Carrier.

[10] The evidence does not support Plaintiffs' request for a findings of fact that the policy was extended until November 19, 1984.

took effect, the notice is insufficient because it did not provide full information and is misleading.[11] While condition XIII of the policy requires "immediate written advice" of "an incident or circumstance likely to give rise to a claim," condition I(a) requires "full information with respect to the time, place and circumstances of the event complained of." The application notice refers only to "unauthorized change orders." This is not full information, as it does not even mention to what the change orders relate.

The notice is misleading, and did not give rise to a duty on the insurer to investigate the potential claim. Generally, good faith requires that an insurer notify an insured of deficiencies in notice within a reasonable time period. If the insurer fails to so notify, it waives its right to assert defective notice, later. See Federal Sav. and Loan Ins. Corp. v. Burdette, 718 F. Supp 649, 654 (E.D. Tenn. 1989); see also W.R. Grace & Co. v. Maryland Casualty Co., 600 N.E.2d 176, 182-83 (Mass. App. Ct. 1992). The notice states that the claim "has already been filed with Carrier." Testimony established that this meant that the

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[11] The Court, however, does not deem the notice insufficient as a matter of law simply because it was given in a policy application. See W.R. Grace & Co. v. Maryland Casualty Co., 600 N.E.2d 176, 182 (Mass. App. Ct. 1992) (notice insufficient when buried in 57-page application among "wholly unrelated underwriting data"). Contrary to Defendants' assertions, W.R. Grace does not hold that notice given in a policy application is insufficient as a matter of law.

item had been filed with the U.K. carrier. Defendants, however, reasonably could have believed that the unauthorized extras were part of one of two earlier noticed potential claims arising out of BDA's SAMA work. Defendants, therefore, were not required to notify BDA of the deficiency within a reasonable time period.

3. Inadequate notice of the HVAC claim

Defendants contend that BDA's notice regarding the HVAC problem was inadequate. Although BDA noticed Shand in 1981, Defendants argue that the 1981 incident was not the same as the problem that arose in 1986. Defendants have failed to show that the problems are distinct. The Court is satisfied that the notice provided in 1981 covered the claim that arose in 1986.

4. Specific operations exclusion

Defendants argue that the specific operations exclusion prevents Plaintiffs' recovery. As explained above, that exclusion barred only BDASA's supervision work from coverage. Further, because the electrical claims were not properly noticed, and because the mechanical claims were noticed prior to the effective date of the exclusion, this exclusion is inapplicable in this case.

B. Damages

Defendants are liable to BDA for the amount of the HVAC claim. The total amount of fees and claims due

and payable to all BDA entities is SR. 13,014,337.[12] Loss due to design negligence constitutes 72.14%, or SR. 9,388,542.70, of the total.[13] The loss due to the HVAC problem was 31.5% of the design negligence.[14] Therefore, Defendants are liable for SR. 2,957,390.90, or $788,367.57.

BDA noticed the HVAC claim to Northbrook under policy number 63133836 that provides $1 million coverage with a $25,000 deductible. Therefore, BDA is entitled to recover $763,367.57 from Northbrook.

III. UNFAIR TRADE PRACTICES

Count II of Plaintiffs' complaint asserts that Defendants violated Mass. Gen. L. ch. 93A §§ 2 and 11. To prevail in an action under chapter 93A §§ 2 and 11, a plaintiff must prove that a person who is engaged in trade or business committed an unfair or deceptive act, and that the plaintiff suffered a loss of money or property as a

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[12] The Court recognizes that this figure is lower than that listed in the zero-sum settlement. This is the sum that Comptroller Shapleigh figured in 1988, and it reflects partial payment by the SAMA.

[13] The SAMA asserted claims totalling SR. 18,212,401 against BDA in their 9215 letter. The SAMA allocated SR. 13,139,249, or 72.14%, to design claims.

[14] Of the SR. 13,139,249 allocated to design claims, the SAMA allocated only SR. 4,139,249, or 31.5% to the HVAC problem.

result. Alan Corp. v. International Surplus Lines Ins. Co., 823 F. Supp. 33, 43 (D. Mass. 1993).

Chapter 93A does not define "unfair." Conduct that violates Mass. Gen. L. ch. 176D is evidence of unfairness under chapter 93A. Alan Corp., 823 F. Supp. at 43-44 n. 4. Plaintiffs allege that Defendants violated chapter 176D §§ 3(9)(d) (it is unfair to refuse "to pay claims without conducting a reasonable investigation based upon all available information") and (f) (it is unfair to fail "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear"). While Defendants' conduct was inappropriate and at times heavy-handed, Plaintiffs did not establish that the Defendants failed to conduct a reasonable investigation. Further, initially, liability in this case was not reasonably clear.

Plaintiffs also allege that Defendants violated the judicially-promulgated definition of unfairness under chapter 93A. Under Massachusetts law, an alleged unfair trade practice is unfair if it is within "'the penumbra of some common-law, statutory or other established concept of unfairness ... [or] is immoral, unethical, oppressive or unscrupulous.'" Farm Bureau Fed'n Inc. v. Blue Cross of Mass., Inc., 532 N.E.2 660, 665 (Mass. 1989) (quoting Zayre Corp. v. Computer Sys. of America, Inc., 511 N.E.2d 23, 30 (Mass. App. Ct. 1987). The Court is not persuaded that Defendants' conduct rose to the level of unfairness.

Judgment for Plaintiffs in the amount of $788,367.57 on Count I. Judgment for Defendants on

Count II.

SO ORDERED.

/s/
MORTON A. BRODY
United States District Judge

Dated at Bangor, Maine this 15th day of February 1994.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BROWN DALTAS AND ASSOCIATES INC., BENJAMIN I. BROWN, SPERO DALTAS, AND BROWN DALTAS AND ASSOCIATES SAUDI ARABIA LTD., Plaintiffs,	)
v.	)Civ. No. 91-10010-K
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, AND NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY, Defendants.	)

JUDGMENT

This action came to trial before the Court, the Honorable Morton A. Brody presiding. The issues have been tried and a decision has been rendered pursuant to the Order and Memorandum of Opinion dated February 15, 1994.

IT IS ORDERED AND ADJUDGED that Judgment is hereby entered on Count I for Plaintiffs against Defendant Northbrook Excess and Surplus Insurance Company for $1,086,695.26. This figure is the sum of the judgment of $768,367.57, and prejudgment

interest in the amount of $298,327.69, which is 12% per annum accruing from January 3, 1991. Defendant Northbrook Excess and Surplus Insurance Company's actual liability is $1,061,695.26. This figure is the judgment less the $25,000 policy deductible. Judgment is hereby entered on Count I for Defendant General Accident Insurance Company.

IT IS FURTHER ORDERED AND ADJUDGED

that Judgment is hereby entered for the Defendants on Count II.

APPROVED:

/s/

MORTON A. BRODY
United States District Judge

NOTE: The post-judgment interest rate effective this date is 3.74%.

Dated this 1st day of March 1994.

ROBERT J. SMITH, JR.
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BROWN DALTAS AND ASSOCIATES INC., BENJAMIN I. BROWN, SPERO DALTAS, AND BROWN DALTAS AND ASSOCIATES SAUDI ARABIA LTD., Plaintiffs,	)	
v.	)	Civ. No. 91-10010-K
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, AND NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY, Defendants.	)	

ORDER

BRODY, District Judge

The judgment in this matter was filed on March 1, 1994, after entry of the Order and Memorandum of Opinion Defendant Northbrook Excess and Surplus Insurance Company ("Northbrook") has since filed a Motion to Amend Judgment. Plaintiffs have also filed a Motion to Amend Judgment, and an Opposition to Northbrook's Motion to Amend Judgment.

A. Northbrook's Motion to Amend Judgment

The Court found Northbrook liable for the amount of the Saudi Arabian Monetary Authority's ("SAMA's") heating, ventilation and air conditioning ("HVAC") claim against Brown Daltas and Associates Inc. ("BDA"). (Ct.'s Order and Mem. of Op. at 18.) Northbrook argues that the Court erred when apportioning the total HVAC claim between design and supervision errors. The Court is persuaded that its use of the so-called "9215 letter" to apportion design and supervision errors was appropriate, and is supported by the evidence. (Ct.'s Order and Mem. of Op. at 10.)

Northbrook also argues that it should not be liable for the SR. 9,044,697 in claims that BDA requested from the SAMA. The Court disagrees. The claims were not "mere puffing" to improve BDA's settlement posture; they were part of the proposed zero-sum settlement in the 9215 letter. More importantly, however, Defendants consented to the zero-sum settlement in the so-called "Hatem-Hinkle letter". This letter "requires Defendants to indemnify BDA subject only to 'coverage defenses.'" (Ct.'s Order and Mem. of Op. at 14.) There was not presented sufficient evidence to establish that BDA's claims were subject to any coverage defense.

The Court calculated prejudgment interest on the amount that Northbrook was found liable to Plaintiffs. Northbrook argues that prejudgment interest should not be assessed based on Northbrook's liability, but on the liability less the policy deductible. The Court is satisfied that its method of calculation is correct.

B. Plaintiffs' Motion To Amend Judgment

Plaintiffs argue that the Court should award prejudgment interest from February 16, 1990, the date of the zero-sum settlement, and not from the date of filing this action, January 3, 1991. The Court rejects Plaintiffs' argument. Because the date of breach was not clearly established, prejudgment interest should be calculated from the date of filing. See mass. Gen. L. ch. 231, § 6C ("If the date of the breach or demand is not established, interest shall be added by the clerk of the court ... from the date of the commencement of the action").

The Court recorded the judgment against Northbrook as SR. 2,957,390.90, but incorrectly converted the figure into U.S. dollars. (See Ct.'s Order and Mem. of Op. at 18-19.) Judgment against Northbrook should have read $788,637.57.

The parties entered into a joint stipulation, and the record now includes a complete General Accident policy number PE11970. While the policy was extended through November 19, 1984 (see Ct.'s Order and Mem. of Op. at 16, n.10), notice of the electrical claim was "insufficient because it did not provide full information and is misleading." (Id. at 16.)

SO ORDERED.

/s/
MORTON A. BRODY
United States District Judge

Dated at Bangor, Maine this 25th day of April 1994.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BROWN DALTAS AND ASSOCIATES INC., BENJAMIN I. BROWN, SPERO DALTAS, AND BROWN DALTAS AND ASSOCIATES SAUDI ARABIA LTD., Plaintiffs,	)
v.	)
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, AND NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY, Defendants.	)Civ. No. 91-10010-K

AMENDED JUDGMENT

This action came to trial before the Court, the Honorable Morton A. Brody presiding. The issues have been tried and a decision has been rendered pursuant to the Order and Memorandum of Opinion dated February 15, 1994, as amended by the Order dated April 25, 1994.

IT IS ORDERED AND ADJUDGED

that Judgment is hereby entered on Count I for Plaintiffs against Defendant Northbrook Excess and Surplus Insurance Company for $1,087,066.78. This figure is the sum of the

judgment of $788,637.57, and prejudgment interest in the amount of $298,429.21, which is 12% per annum accruing from January 3, 1991 until March 1, 1994. Defendant Northbrook Excess and Surplus Insurance Company's actual liability is $1,062,066.78. This figure is the judgment less the $25,000 policy deductible. Judgment is hereby entered on Count I for Defendant General Accident Insurance Company.

IT IS FURTHER ORDERED AND ADJUDGED

that Judgment is hereby entered for the Defendants on Count II.

APPROVED:

/s/
MORTON A. BRODY
United States District Judge

NOTE: The post-judgment interest rate effective this date is 3.74%.

Dated this 25th day of April 1994.

ROBERT J. SMITH, JR.
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 94-1576

BROWN DALTAS & ASSOCIATES, INC., ET AL.,

Plaintiffs, Appellees,

v.

GENERAL ACCIDENT INSURANCE COMPANY
OF AMERICA, ET AL.,

Defendant, Appellee,

NORTHBROOK EXCESS & SURPLUS
INSURANCE CO.,

Defendant, Appellant.

BEFORE
Selya, Circuit Judge,
Bownes, Senior Circuit Judge,
and Stahl, Circuit Judge.

ORDER
Entered: **March 21, 1995**

The petition of plaintiffs-appellees Brown Daltas & Associates, Inc., et al. ("BDA") for panel rehearing is denied.

BDA's petition suffers from the same infirmities as did its initial brief: there is no clear identification of the "circumstance" which led BDA to inform its carriers of the possibility of a claim. At one point, BDA seems to say that the statement of Laing Wimpey Alireza Ltd. ("LWA") that it was submitting to the Saudi Arabian Monetary Authority ("SAMA") a priced claim for extra costs was the notice-triggering event. See Petition at 4. At another, it seems to suggest that it was the notice from LWA to BDA of the post-construction "commissioning" problems. Id. at 7.

Neither of these two assertions were made by BDA until its petition for rehearing. See Opinion at 22 (detailing BDA's inconsistent assertions regarding the notice-triggering circumstances). Accordingly, they are untimely. Even if we did consider them to be properly raised, however, there is no record evidence proving that the now-alleged circumstance first occurred during the policy period.

With regard to the first alleged notice-triggering event -- LWA's submission of the priced claim to the SAMA (or LWA's indication that it would be submitting such a claim) -- the opinion is correct. There is no record evidence indicating exactly when LWA submitted its

claim to the SAMA, or even indicating when LWA said it was going to submit its claim to the SAMA[1]. With regard to the second alleged notice-triggering event -- the notice from LWA to BDA of post-construction commissioning problems -- the record evidence is that BDA received this notice in "May 1981." See Appendix at 1337. Because the Policy ran from May 5, 1981 through June 4, 1982, this evidence is insufficient to prove that BDA first became aware of the commissioning problems during the policy period. The communication could have taken place May 1-4, 1981.

BDA neither took issue with Northbrook's argument that LWA's design criticism was the notice-triggering event, nor specifically articulated the aforementioned notice-triggering circumstances until now. Moreover, there is no record evidence demonstrating that either of the circumstances to which it now points first occurred during the policy period. Because it bore the burden of proof on the notice question, this absence of articulation and evidence must be held against it.

By the Court:

---

[1] The November 18, 1981 letter which is appended to the petition (but which was not included in the appellate appendix) generally indicates that LWA was submitting its claim contemporaneously to the sending of the letter. There is, however, insufficient specificity in the letter to ground a ruling for BDA on this issue.

Francis P. Scigliano, Clerk

By:___/s/_____
Chief Deputy Clerk

Messrs. Cowen, Reppert, Lund, Hatem, Sullivan & Shields

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 94-1576

BROWN DALTAS & ASSOCIATES, INC., ET AL.,

Plaintiffs, Appellees,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, ET AL.,

Defendant, Appellee,

NORTHBROOK EXCESS & SURPLUS INSURANCE CO.,

Defendant, Appellant.

BEFORE

Torruella, Chief Judge,
Bownes, Senior Circuit Judge,
Selya, Cyr, Boudin & Stahl, Circuit Judges.

ORDER OF THE COURT

Entered: March 21, 1995

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By The Court
FRANCIS P. SCIGLIANO, Clerk

By: /s/
Chief Deputy Clerk

Messrs. Cowen, Reppert, Lund, Hatem, Sullivan & Shields

(2)

No. 94-2087

Supreme Court, U.S.
FILED
JUL 17 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

BROWN DALTAS AND ASSOCIATES, INC., BENJAMIN I. BROWN, SPERO DALTAS, AND BROWN DALTAS AND ASSOCIATES SAUDI ARABIA, LTD.,
PETITIONERS,

v.

NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the First Circuit Court of Appeals in overturning a plaintiff's verdict of insurance coverage, on the grounds of a legal error in applying the burden of proof, merits intervention by the United States Supreme Court under its power of judicial supervision.

LIST OF PARTIES

Respondent Northbrook Excess and Surplus Insurance Company adopts the list of parties identified in the brief of the Petitioner. Pursuant to Supreme Court Rule 29.1, Respondent states that it has merged into Allstate Insurance Company, a publicly-traded company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	4
REASONS FOR DENYING THE WRIT	5
I. The Grant Of Certiorari Is Not Warranted In This Case	6
II. The First Circuit Properly Reversed The Trial Court Due To An Error Of Law In Applying The Burden Of Proof	7
III. The First Circuit Correctly Decided This Case On Its Merits	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

Dedham Water Co., Inc. v. *Cumberland Farms Dairy, Inc.*, 972 F.2d 453 (1st Cir. 1992)	9
Inwood Laboratories, Inc. v. *Ives Laboratories, Inc.*, 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982)	8
McNabb v. *United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943)	7
New York City Transit Authority v. *Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979)	7
Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955)	6

Rules

	Page
Supreme Court Rule 10.1	6
Supreme Court Rule 10.1(a)	2
Supreme Court Rule 29.1	ii
Federal Rule of Civil Procedure 52(a)	8, 9

In the
Supreme Court of the United States

94-2087

OCTOBER TERM, 1994

BROWN DALTAS AND ASSOCIATES, INC., BENJAMIN I. BROWN, SPERO DALTAS, AND BROWN DALTAS AND ASSOCIATES SAUDI ARABIA, LTD.,
PETITIONERS,

v.

NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Northbrook Excess and Surplus Insurance Company ("Northbrook"), respectfully requests that this Court deny the Petition for a Writ of Certiorari submitted by Petitioners Brown Daltas and Associates, Inc., Benjamin I. Brown, Spero Daltas, and Brown Daltas and Associates Saudi Arabia, Ltd. (collectively, "Petitioner" or "Brown Daltas").

OPINIONS BELOW

Respondent adopts the citations of the opinions and judgments below set forth in the brief of the Petitioner.

JURISDICTION

Respondent adopts the Petitioner's statement of the jurisdiction of the federal courts over this matter.

The Supreme Court's jurisdiction over this matter depends on the third clause of Supreme Court Rule 10.1(a), which provides that a writ of certiorari may be granted when a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No constitutional provisions, treaties, statutes, ordinances or regulations are involved in this case.

STATEMENT OF THE CASE

This action concerns an insurance coverage dispute. The Petitioner is an architect, formerly insured under a liability insurance policy issued by the Respondent (the "Policy"). Petitioner brought this lawsuit, seeking indemnification in regard to an underlying claim of negligence asserted by its former client, the Saudi Arabian Monetary Authority ("SAMA"). At issue is whether there is coverage under the Policy for the claim asserted against Brown Daltas by SAMA.

The Policy is a claims-made, professional liability insurance policy which generally provides coverage for claims of negligence first asserted against the insured during the policy period. Central to this dispute is the additional coverage provided under the discovery clause of the Policy for claims made after expiration of the policy period "[i]f during the policy period the Insured shall *first become aware of any circumstances which may subsequently give rise to a claim against the Insured*... and if the Insured shall during the policy period herein give written notice to [Northbrook] of such circumstances." (emphasis added)

During the policy period, Brown Daltas gave written notice to Northbrook of circumstances which could give rise to a claim against it. The potential claim related to Brown Daltas' design of the heating, ventilation and air conditioning ("HVAC") system in the SAMA bank building located in Riyadh, Saudi Arabia.

No claim was actually made by SAMA until 1987, five years after expiration of the policy period. Thus, coverage for the HVAC claim depends on the application of the discovery clause of the Policy, and more particularly, on whether Brown Daltas first became aware of circumstances which could give rise to the claim during the policy period.

After a jury-waived trial, the District Court for the United States District of Massachusetts (Brody, J.) found that the Policy covered the HVAC claim asserted by SAMA. In its memorandum decision, the trial court made only a passing reference to the issue of when Brown Daltas first received notice of the HVAC problem. *See* Appendix to Brief of Petitioner ("Appendix") at A37 n.3. The district court quoted a portion of the letter from the

contractor, LWA, to the Petitioner, dated July 19, 1981, in which LWA referenced an "error within your specification . . . pointed out in 1979." *Id.* The trial court held, "This letter reference alone is insufficient to prove that BDA or BDASA had notice in 1979." *Id.*

Northbrook appealed the judgment on the grounds, *inter alia*, that Brown Daltas had failed to satisfy a condition precedent to coverage under the discovery clause, i.e. that it *first* became aware of circumstances which subsequently gave rise to the HVAC claim during the policy period.

The First Circuit agreed with Northbrook. The appeals court correctly determined that the burden of proof to establish coverage under the discovery clause of the Policy lay with the Petitioner; and that the lower court had erroneously shifted this burden to Northbrook. After a careful review of the evidence in light of the correct legal standard, the First Circuit held that no reasonable factfinder could conclude that Brown Daltas had proved that it had first become aware of circumstances subsequently giving rise to SAMA's claim during the policy period. The First Circuit reversed the judgment of the lower court and directed the entry of judgment in favor of Northbrook. Brown Daltas' Petition to this Court for a Writ of Certiorari followed.

SUMMARY OF THE ARGUMENT

This matter does not present special and important reasons for the grant of certiorari. No constitutional, statutory or substantial federal question is raised in the Petition. The judgment of the First Circuit Court of Appeals is well-reasoned, supported by the factual record and applicable legal precedent, raises no extraordinary issues, and does not depart from the accepted and ordi-

nary course of judicial proceedings. For these reasons, the exercise by this Court of its power of judicial supervision is unnecessary and unwarranted.

The First Circuit properly reversed the judgment of the district court because the lower court had committed an error of law in shifting the burden of proof to Northbrook on the dispositive coverage issue. In light of this legal error, the First Circuit was not required to give its usual deference to the trial court's factual findings. The First Circuit correctly held that no rational factfinder could conclude that Brown Daltas had satisfied its burden of proof. Since further judicial proceedings would be an "empty exercise" and a waste of judicial resources, the First Circuit properly resolved the case without remand.

REASONS FOR DENYING THE WRIT

Respondent submits that Brown Daltas' Petition for a writ of certiorari should be denied for three reasons:

First, this matter concerns a contract dispute between civil litigants on a routine issue of insurance coverage law for which review by the Supreme Court is not merited.

Second, the First Circuit properly reversed the holding of the trial court which was infected by an erroneous application of the burden of proof on the dispositive coverage issue.

Third, the First Circuit correctly held that there was no coverage under the Policy for the HVAC claim asserted by SAMA because Brown Daltas did not meet its burden of proving that it first became aware of the circumstances subsequently giving rise to the claim during the policy period, rather than at an earlier date.

I. The Grant of Certiorari Is Not Warranted in This Case.

"A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Supreme Court Rule 10.1. "'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955). This case does not rise to the level of importance which merits review by the Supreme Court.

Petitioner incorrectly asserts that special and important reasons exist here which would justify the grant of certiorari.[1] In fact, this is a "run of the mill" contract dispute between civil litigants. This case does not implicate any constitutional, statutory or other substantial federal questions.

[1] The only argument made by Petitioner which implicates issues beyond the specifics of this case is that the First Circuit has created an unworkable rule of law by requiring insureds to report complaints of any nature to their insurers; and that bad faith denials of insurance coverage will be promoted. Brief of Petitioner at page 9, footnote 2. This concern was effectively addressed by the First Circuit:

> "[W]hile we agree completely that generalized criticisms of shortcomings in a party's product or performance will ordinarily be insufficient, without more, to serve as a notice-triggering circumstance for purposes of claims-made coverage, this is not the garden-variety case. Here, the insured's lack of proof is a determining factor."

Appendix at A28-29.

The decision of the First Circuit stands for the simple proposition that where an insured is seeking coverage under the discovery clause of a claims-made policy, it will have the burden to prove that it first became aware of circumstances which subsequently gave rise to the claim during the policy period.

The Supreme Court has granted certiorari in the exercise of its power of judicial supervision only in rare circumstances, typically where constitutional issues are involved. For example, in *McNabb* v. *United States*, 318 U.S. 332, 340-41, 63 S.Ct. 608, 87 L.Ed. 819 (1943), the Court granted certiorari under its power of supervision to reverse a murder conviction which had been tainted by an inadmissible confession. In *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 571, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979), the Court granted certiorari to exercise its supervisory authority where the Second Circuit had departed from usual and ordinary judicial procedure by deciding a constitutional issue prior to resolving a statutory issue. The Respondent is not aware of any case — nor is any cited by Petitioner — in which the Court has granted certiorari to exercise its power of supervision over an appeals court's resolution of a contract dispute between private parties. Nor is there any precedent for this Court to grant certiorari merely because the appeals court undertook an independent review of the evidence in light of the proper allocation of the burden of proof.

II. The First Circuit Properly Reversed The Trial Court Due to an Error of Law in Applying The Burden of Proof

Far from a "departure" from the usual course of judicial proceedings, the First Circuit fulfilled its proper role as an appeals court in correcting the trial court's erroneous allocation of the burden of proof and a factual finding which could only have had its origin in that erroneous allocation. The First Circuit has acted well within its discretion as a court of appeal.

In essence, Petitioner asserts that the First Circuit committed two procedural errors in reversing the judgment

of the trial court and that these errors together constitute a "gross departure" from the normal course of judicial proceedings. First, Petitioner argues that the First Circuit usurped the role of the district court as the trier of fact in violation of Federal Rule of Civil Procedure 52(a) which requires that factual findings not be disturbed on appeal unless they are "clearly erroneous." Second, Petitioner suggests that the First Circuit "manufactured" a non-existent error of law in the district court's opinion in order to "go behind" the trial court's findings, and thereby substitute its own findings of fact. Neither of these arguments is credible.

Contrary to Petitioner's assertions, whether or not the trial court's factual findings were "clearly erroneous" is beside the point. The First Circuit never reached the issue; and the Petitioner's argument that "there would have been no grounds for reversal of the District Court's decision" if the "clearly erroneous" standard had been applied (Brief of Petitioner at 10-11) is pure speculation.

The First Circuit specifically acknowledged that in reviewing the factual findings of the trial court, it "almost invariably appl[ies] the clear-error standard of review." Appendix at A20. However, where "the trial court based its finding upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Id.*, quoting *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982).

The First Circuit specifically held:

> "Here, we think it clear that the trial court's finding regarding when the insureds first had notice of circumstances subsequently giving rise

> to the SAMA's claim was predicated upon an error of law."

Appendix at A21. Accordingly, the clearly erroneous standard of review under Rule 52(a) did not apply. To the contrary, because the trial court's factual findings were predicated upon, or induced by an error of law, the appeals court accorded those findings "diminished respect" in reviewing the record on appeal. *Id.* at A20; *Dedham Water Co., Inc.* v. *Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 457 (1st Cir. 1992).

Once it determined that the trial court had committed a legal error, the First Circuit undertook a careful and detailed review of the evidence regarding the issue of notice. The Court determined that there was "significant record evidence" indicating that criticism of Brown Daltas' design of the HVAC system *predated* the policy period. Appendix at A27. The appeals court also found that "there is a *total absence* of evidence tending to indicate that LWA's criticism of the HVAC's design first occurred during the policy period." *Id.* at A28. (emphasis added)

On this record, the First Circuit determined that only one rational conclusion was possible — that Brown Daltas first became aware of circumstances which gave rise to the HVAC claim *prior* to inception of the Policy. Because remand would be no more than an "empty exercise" (*Id.* at A24), the First Circuit properly resolved the issue itself, and held that the Petitioner had failed to prove that the underlying claim of design negligence was covered by the Policy.

III. The First Circuit Correctly Decided This Case On Its Merits

The First Circuit correctly held that once the evidence is viewed in light of a proper allocation of the burden of proof, Brown Daltas failed to satisfy its burden.

The essential holding of this case is that an insured under a claims-made policy who seeks to invoke the coverage provided by the discovery clause of the policy must prove, by a preponderance of the evidence, that it first became aware of circumstances which subsequently gave rise to the claim during the policy period. In its Petition, Brown Daltas does not contend that this rule of law is incorrect or in conflict with the decision of any other court of appeal. Instead, Brown Daltas contends that the First Circuit erred when it applied this rule to the evidence in this case.

As noted by the appeals court, there is ample evidence indicating that serious criticism of the HVAC design predated the inception of the policy — and *no* evidence which indicates that LWA's criticism of the HVAC design *first* occurred during the policy period:

> "This evidence includes the July 19, 1981 letter's indications that problems with the design of the on/off coils had been pointed out in 1979, and that problems with the design of Condensing Unit No. 5 had been pointed [out] in 1978. It also includes: (1) Mr. Brown's direct testimony that LWA had informed the insureds' [sic] of its view that the HVAC system 'would not function satisfactorily' within a year-and-a-half or two years of construction beginning (in late 1978 or early 1979); (2) Mr. Brown's direct testimony that LWA had seriously criticized the

> design of the HVAC systems within two years of construction beginning; and (3) Mr. Brown's concession on cross examination that the problems asserted by LWA regarding the air conditioning had been asserted back in 1978-79."

Appendix at A27-28. Accordingly, the appeals court's determination of no coverage is well supported in the record. The First Circuit's holding is correct and should not be disturbed by this Court.

CONCLUSION

Because this case presents no issue appropriate for the Supreme Court's review, and because the decision of the First Circuit Court of Appeals is not in error, Respondent Northbrook Excess and Surplus Insurance Company respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

NORTHBROOK EXCESS AND
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